Supreme Court, U.S.
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No. 95-841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ALBERT AKINS, *et al.*,
Petitioners,
v.

ZENECA, INC.; RHONE-POULENC, INC.; RHONE-POULENC BASIC CHEMICALS COMPANY; STAUFFER CHEMICAL COMPANY; INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO; LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS, LOCAL 912, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, IN OPPOSITION

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QUESTIONS PRESENTED

Although the Petitioners state numerous pages of Questions Presented, the Respondents, Local 912, International Union of Operating Engineers, AFL-CIO ("Local 912 Respondents"), assert that the only questions as to Local 912 which are properly presented by the Petition for Certiorari are:

1. Whether the Court of Appeals properly ruled that Local 912 Respondents did not breach their duty of fair representation to the Petitioners.

2. Whether the Court of Appeals properly ruled that there was no breach of the Constitution of the International Union of Operating Engineers by Local 912 Respondents.

3. Whether the Court of Appeals properly ruled that there was no factual basis for Plaintiffs'/Petitioners' conspiracy claims.

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OPINIONS BELOW

The opinions below which Petitioners challenge are unpublished and are reproduced in the Appendix, the Decision of the United States Court of Appeals for the Sixth Circuit at A. 128 and the Decision of the United States District Court for the Middle District of Tennessee at A. 1.

JURISDICTION

Respondents admit Petitioners' allegation of jurisdiction but deny that this case presents any issue over which this Court should assert jurisdiction.

STATUTE INVOLVED

Petitioners' primary claim arises under Section 301 of the Labor-Management Relations Act, as amended, 29 U.S.C. § 185. Petitioners' other claims are based on common law theories under the laws of the State of Tennessee.

STATEMENT OF THE CASE

This Petition for Certiorari was filed by current and former employees of Respondent Rhone-Poulenc (hereinafter "R.P."), in a case growing out of the closing of their furnace plant worksite due to exhaustion of necessary local minerals (A. 134, Bench Ruling of 10/21/93). Defendant Stauffer formerly operated two separate production facilities in Mt. Pleasant, Tennessee, known as the organic plant and the furnace plant. (A. 33, Memorandum Opinion of 6/28/93). At all times material hereto, the certified collective bargaining representative for the employees of both plants was Local 912, International Union of Operating Engineers (hereinafter "Local 912"). (*Id.*).

Prior to 1982, there was a single collective bargaining agreement (CBA) for the organic and furnace plants. (*Id.*) During contract negotiations in 1982, Stauffer sought to separate the organic and furnace plants into two separate bargaining units, one for each plant. (A. 136, Bench Ruling of 10/21/93). The members of Local 912 in both plants, through the democratic processes of their Union organization, elected a Bargaining Committee and such Committee agreed to the division into two separate units. (A. 147-48, Bench Ruling of 10/21/93). This Bargaining Committee, representing both plants, was

granted the power to approve and ratify the proposed CBAs without referring the same for full membership vote. (*Id.*).

At the time the bargaining unit was divided, Stauffer and Local 912 entered into a Memorandum of Agreement, which has come to be known as the 9/13/82 Memorandum. (A. 137, Bench Ruling of 10/21/93). The 9/13/92 Memorandum was incorporated by reference into the 1982 CBAs for each plant. (*Id.*) It provided that in the event of a reduction in force at either facility, the employees of that facility had a one-time opportunity to exercise their seniority to displace less senior employees at the other facility ("bump"), under certain limited conditions. (A. 137-38, Bench Ruling of 10/21/93).

In 1985, Stauffer and Local 912 renewed the CBAs for the organic and furnace plants for a three year period. (A. 37, Memorandum Opinion of 6/28/93). Defendant ICI Americas (hereinafter "ICI"), purchased Stauffer in 1987 and continued to operate both the organic and furnace plants (*Id.*) ICI assumed the obligations under the 1985 CBAs for both facilities. (*Id.*). Later in 1987, ICI sold the furnace plant to Defendant/Respondent Rhone-Poulenc. (Hereinafter "R.P.") (*Id.*) In 1988, both ICI and R.P. entered into new, separate, CBAs with Local 912, each for a three year period. (A. 40, Memorandum Opinion of 6/28/92). Both of these agreements incorporated by reference the 9/13/82 Memorandum. (*Id.*)

In June of 1990, R.P. announced it intended to close the furnace plant. (A. 41, Memorandum Opinion of 6/28/93). Anticipating problems related to the loss of work and the 9/13/82 Memorandum, the chief officer for Local 912, Business Manager James Kincade, wrote the President of the International Union, General President Frank Hanley, explaining the dilemma of being caught in the middle between two groups of its own members in a

job loss situation. (A. 42, Memorandum Opinion of 6/28/93).

In his letter, Mr. Kincade described the 9/13/82 Memorandum, indicated that one of the plants was scheduled to close, and asked, if the employees at one of the plants proposed to do away with the Memorandum, which group of employees would be entitled to vote on such a proposal under the provisions of Article XXIV, Subdivision 11, Section (e) of the International Union Constitution.* (A. 236, Plaintiffs' Ex. No. 7). The question of approval by the membership under Article XXIV, Subdivision 11, Section (e), turned out to be moot as the 1991 Contract for ICI was negotiated under the proviso to that Article which allowed the membership to authorize the Negotiating Committee to approve the new CBA without submitting the same to vote of the membership. (A. 152, Bench Ruling of 10/21/93).

In seeking how legally and appropriately to resolve the issues among its members, Mr. Kincade also sought legal advice from Local 912's counsel which ultimately resulted in the filing of a Declaratory Judgment action by the Union on 10/16/90. (A. 43, Memorandum Opinion of 6/28/93). That action sought to obtain a Court

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* Article XXIV, Subdivision 11, Section (3) provides, in pertinent part:

> Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, *provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.* (Emphasis added to Proviso.)

Ruling on rights, obligations and duties of all parties where each plant included the 9/13/82 Memorandum in their CBA. While the parties to this action were engaging in written discovery and scheduling discovery depositions, on June 11, 1991, ICI and the elected Negotiations Committee for Local 912 entered into a new CBA which deleted all references to the 9/13/82 Memorandum. (A. 44, Memorandum Opinion of 6/28/93). This CBA resolved the issues concerning the 9/13/82 Memorandum and Local 912 dismissed the Declaratory Judgment action as moot. (A. 45, Memorandum Opinion of 6/28/93).

Two of the Petitioners, Terrance Nevette and Waylon Carroll, transmitted by facsimile a letter with exhibits to the International Union's President expressing their concern about the situation. (A. 45-6, Memorandum Opinion of 6/28/93). The General President forwarded the letter to Mr. Kincade requesting a reply. By letter dated 7/16/91, Kincade sent a four-page response to Hanley explaining the dilemma in which Local 912 found itself. (A. 278, Kincade letter to Hanley). That letter fully explained the actions taken by Local 912 and the reasoning behind the same, explaining:

> . . . I have sought guidance from your office and IOUE's Legal Department as well as Local 912's attorney. Any route 912 goes there is disagreement. It's just a question of whose ox is getting gored.
>
> (A. 285, 7/16/91 Kincade Letter to Hanley).
>
> . . . .
>
> Local 912's position has not changed. Local 912 knows what the intent and objective of the 1982 Memorandum was. It is the changing of time and events that has caused the problem of gaining the objective of bumping under the 1982 Memorandum . . .
>
> Our members who are disgruntled who work at Rhone-Poulenc think that Local 912 can just wave

> a magic wand and effect the bump, regardless of all that has transpired . . .
>
> Local 912 intends to do the best it can with the situation. If you have any suggestions as to how to equitably resolve the dilemma, please advise.
>
> (A. 288-9, 7/16/91 Kincade Letter to Hanley).

In November, 1991, sixty-eight employees of R.P. filed suit against the Defendants/Respondents alleging violations of § 301 of the Labor Management Relations Act, 19 U.S.C. § 185; § 101 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411. In their lawsuit, the Plaintiffs also brought pendant state law tort claims based on tortious interference with contract and conspiracy. The United States District Court for the Middle District of Tennessee dismissed all of the Plaintiffs' claims following the Defendants' Motions for Summary Judgment (A. 115, Order of 6/28/93) and Motions for a Directed Verdict (A. 128, Bench Ruling of 10/21/93).

On the hybrid Section 301/DFR claim against R.P. and Local 912, the Court dismissed the full claim under the Doctrine of Impossibility (A. 145, Bench Ruling of 10/21/93). On the claim against Local 912 of Breach of the DFR by allowing ICI to negotiate the 9/13/82 Memorandum out of its CBA, the Court determined that there was no evidence of hostile or discriminatory action, bad faith or arbitrary or irrational conduct on the part of Local 912. (A. 149-150, Bench Ruling of 10/21/93.) The Court further determined that no violation occurred as the Bargaining Committee was properly authorized to negotiate and approve the CBA without a membership vote. (A. 148, 152, Bench Ruling of 10/21/93.) The District Court also dismissed the Constitutional claim against Local 912 arising under Article XXIV, Subdivision 11(e), determining that the language of the proviso of that Section was properly followed. (A. 154-5, Bench

Ruling of 10/21/93.) The State claims were dismissed before trial. (A. 115, Order of 6/28/93).

The Sixth Circuit Court of Appeals affirmed all decisions of the District Court. (A. 1, Sixth Circuit Decision of 7/27/95). The Sixth Circuit reversed on the finding of Impossibility but reached the same affirmance of dismissal of the Section 301/DFR claim by determining that Local 912 did not breach the DFR. It further affirmed that Local 912 had not breached the provisions of the Union Constitution nor violated State law.

REASONS FOR DENYING THE WRIT

Petitioners have failed to establish a case which satisfies any of the prerequisites for the granting of a Writ of Certiorari. Rule 10 of the Rules of this Court indicates that such Petitions will be granted only for special and important reasons, including when a Decision by the Court of Appeals is in conflict with the decision of a State Court of last resort or of another Court of Appeals on the same matter and when the lower Court has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such departure, that an exercise of the Supreme Court's power is necessary. The Petition for Certiorari in this case fails to satisfy these or any other ground for granting a Petition and should be denied.

Before addressing the specific reasons Petitioner states for granting this Petition, it should be noted that Petitioners base much of their argument on an initial and interim decision of the District Court (A. 31, Memorandum Decision of 6/28/93). That Memorandum dismissed some portion of Plaintiffs'/Petitioners' Complaint and left the remainder to be determined at trial. When trial was held, at the close of Plaintiffs'/Petitioners' proof, upon Motion of Defendants/Respondents, the Court reconsidered its previous Ruling and made fact determinations based upon the presentation of Plaintiffs' complete case

(A. 28, Bench Ruling of 10/21/93). This final decision contradicted some statements in the previous Order, resolved all issues left open by the previous Order and was the determinative Ruling in this case. Therefore, Petitioners' references to the 6/28/93 Memorandum (A. 28) do not accurately reflect the findings of fact or decisions of law ultimately made at the District Court level. Proper reference to the final decision of the District Court should be made to the 10/21/93 Bench Ruling (A. 128) and its resolution of factual and legal issues.

I. THE DECISION BY THE SIXTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS OR A STATE COURT OF LAST RESORT.

A. Duty of Fair Representation Claim.

The Petitioners fail to show that the decision in this case conflicts with a decision of any other Court. Petitioners allege a conflict by claiming that the Sixth Circuit failed to address all parts of the legal standard governing the Duty of Fair Representation (DFR) and by relying upon two new cases with wholly different factual settings. Neither argument establishes a conflict.

The District Court decision began by stating the nature of a hybrid § 301/DFR case, explaining that a Plaintiff must prove both a breach of the Duty of Fair Representation (DFR) by the Labor organization and a breach of the terms of a collective bargaining agreement (CBA) by the Company in order to prevail against either party. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). The District Court resolved the hybrid claim by holding that no breach of the CBA occurred. The District Court then applied the full DFR test to Plaintiffs'/Petitioners' other DFR claims against Local 912. The factual determinations flowing from this application were one basis of the Sixth Circuit's decision. An analysis of the three-part DFR Standard will clarify this issue.

In 1967, this Court decided *Vaca v. Sipes*, 386 U.S. 171, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967) holding that there is no breach of the duty of Fair Representation unless a union's conduct toward its member is arbitrary, discriminatory or in bad faith. The Supreme Court reaffirmed this principal in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299, 29 L.Ed.2d 473, 91 S.Ct. 1909 (1971) in which it held, "there must be substantial evidence of fraud, deceitful action, or dishonest conduct." That Court defined arbitrary, discriminatory or in bad faith as follows, "the doctrine . . . carries with it [in order to prove a breach of duty] the need to adduce *substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.*" 403 U.S. at 301. (Emphasis added.)

In *Balowski v. Int. U., United A., A. & A. Int. Wkrs.*, 372 F.2d 829, 834 (6th Cir. 1967) the Sixth Circuit held that a union's failure or refusal to accomplish a demand by a member in the processing of his grievance without additional findings of impropriety is insufficient to establish a breach of the duty, noting the requirements that:

> In particular, plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, *for the gravamen of the rule is 'hostile discrimination.'* (Emphasis added.)
>
> 372 F.2d at 835.

Along the same lines, *see generally McKinney v. International Ass'n. of Machinists*, 624 F.2d 745, 749 (6th Cir. 1980) [arbitrary, discriminatory or bad faith action or some other animus-related conduct]; *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1341 (6th Cir. 1975), cert. den., 425 U.S. 981 (1976) [an affirmative showing that the union's inaction was motivated by bad faith is required]; and, *Dill v. Greyhound*

Corp., 425 F.2d 231, 238 (6th Cir. 1970), [hostility, malice or bad faith].

In *Air Line Pilots Assoc. v. O'Neill*, 499 U.S. ——, 113 L.Ed.2d 51, 58, 111 S.Ct. 1127 (1991), the Supreme Court clarified the standard in DFR cases, holding:

> We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's action, the union's behavior is so far outside a wide range of reasonableness, *Ford Motor Co. v. Huffman*, 345 U.S. 340, 348 (1953), as to be irrational.

The Sixth Circuit has adopted this test in *Walk v. P*I*E* Nationwide, Inc.*, 958 F.2d 1323, 1326 (6th Cir. 1992), which holds:

> The Court's holding in *O'Neill* reflects that a deferential standard is employed as to a union's actions. They may be challenged only if 'wholly irrational.' *Id.* at 1136. In carrying out its duty of fair representation, an unwise or even unconsidered decision by the union is not necessarily an irrational decision.

Petitioners first aver that the Sixth Circuit erred by addressing only the arbitrary conduct portion of the standard governing the DFR. What Petitioners fail to state is that the District Court had already applied the other two prongs, discrimination and bad faith, and made a factual determination based upon Plaintiffs' presentation of their full case that Plaintiffs/Petitioners failed to show a breach of these two prongs of the DFR Standard. The District Court fully applied the arbitrary, discriminatory or bad faith standard. In applying the discrimination and bad faith parts of the standard, the District Court found:

> In this case the Court has viewed the evidence according to the standard that is applicable and has determined that under the three-part test there is no evidence of any hostile or discriminatory action on the part of the union. These questions were put to the witnesses and they disavowed that there was any

> hostility or discrimination in the sense that those terms are commonly understood in this area. There was no suggestion that the members of the furnace plant unit were being punished or discriminated against because of any positions that they had taken, or any operation or effect of internal union politics. The Court has also viewed the evidence under the applicable standard and is satisfied that there is no proof as would be required of a bad faith motive; that is, the union has a duty of acting in good faith. There is no evidence in this record of any bad faith motive.
>
> (A. 140, Bench Ruling of 10/21/93).

Having accepted the finding of the District Court that no arbitrary or discriminatory action on the part of Local 912 occurred, the Sixth Circuit addressed the remaining prong of the Standard, arbitrariness. It cited *Vaca v. Sipes*, supra, p. 10, and *Airline Pilots Ass'n., Int'l v. O'Neill*, supra, p. 11, both of which correctly articulate the standard which is accepted by all other Courts of Appeals. The Sixth Circuit determined that Local 912's actions were not arbitrary. (A. 15, Sixth Circuit Decision of 7/27/95). Therefore, the Sixth Circuit did not depart from the accepted and usual course of judicial proceedings nor did it render a decision in conflict with that of another Court of Appeals.

Petitioners allege a conflict between the Sixth Circuit's decision and the recent cases *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138 (2d Cir. 1994) and *Aquinaga v. United Food & Comm. Workers Int'l. Union*, 993 F.2d 1463 (10th Cir. 1993), cert. den., 114 Sup. Ct. 880 (1994). Neither of these cases represent a conflict with the decision in the present case as both apply the very same law and legal standard. Any difference in results between those two cases and the present case is based upon factual differences among the cases.

In *Aquinaga* the Court made specific findings that the Union's activity was both irrational and in bad faith.

Further, the Court credited the plaintiffs' evidence that the Union intentionally sacrificed plaintiffs' rights and concealed the same due to its motivation to benefit itself in another bargaining relationship. (*Aquinaga, supra*, at 1471). Likewise, the Court in *Lewis* specifically found that a secret agreement existed between the company and union representatives and that the same was willfully concealed from union members. (*Lewis, supra*, at 1142-3).

The present decision in the Sixth Circuit simply does not conflict with the decision of another Court of Appeals. In this case, Local 912 was held not to be liable because it did not engage in arbitrary, discriminatory or bad faith conduct. The identical standard was applied in *Lewis*, and *Aquinaga*; however, factual differences in those cases led the Court to determine that violation of this Standard had ocurred. Because there is no conflict of law, there is no basis for the granting of Certiorari.

Lastly, Petitioners seek to rely upon a claimed conflict between the present decision and a case which was applied below, *Steele v. L&N Railroad Co.*, 323 U.S. 192, 89 L.Ed. 173, 65 S. Ct. 226 (1944). *Steele* adds nothing new to this Petition, nor does it establish any conflict among the Circuits. Petitioners merely use this case to re-argue their claims of "hostility and disloyalty" upon which claims the District Court and the Sixth Circuit have already rendered their decisions in accordance with the Standards applicable across the Federal Court system. Therefore, the Petition for Certiorari in this case should be denied.

B. Constitutional Claim.

Petitioners have also alleged that the Sixth Circuit decision is contrary to *Wooddell v. International Bhd. of Elec. Workers*, 502 U.S. ——, 116 L.Ed.2d 419, 112 S. Ct. 494 (1991). *Wooddell* establishes that a union constitution is a contract and may serve as the basis for a Section 301 suit by the member against his/her union. The Sixth Circuit decision does not conflict with this holding

as it expressly recognizes such cause of action. Here, the Sixth Circuit merely determined that the express and unambiguous wording of the constitution was properly followed by Local 912. Petitioners claim that Local 912 violated Article XXIV(11)(e), which states:

> Proposed collective bargaining agreements and modifications thereof may be negotiated for Local Unions by the Business Manager, by a committee, by the Local Executive Board, or by the Business Representative. Such agreements and modifications thereof shall not be executed until they have been presented at the next membership meeting following the negotiation of the proposed agreement and have been approved by the membership affected, *provided, however, that a Local Union may delegate to its Local Executive Board or to its bargaining committee authority to approve such agreements and modifications without such submission of the same to vote of its membership.* (Emphasis added.)

Regarding this claim, the District Court held:

> . . . this provision of Article XXIV, Subdivision 11, Section (e), was explicitly carried out in regular fashion and is reflected in the testimony in this case. The membership of the designated bargaining unit elected its own negotiating committee, instructed that negotiating committee with regard to the demands to submit in negotiations with the company and also expressly authorized that bargaining committee to approve such agreements without submission of the same to the vote of its membership.
>
> The Court holds that there was complete compliance with the provisions of the International Constitution . . . The contract was approved by a duly constituted bargaining committee, those members of the unit who were affected by it, and the Court determines as a matter of law that this claim should be dismissed.
>
> (A. 155-6, Bench Ruling of 10/21/93).

Plaintiffs' § 301 constitutional complaint was properly dismissed by the Court based on the very wording of the Constitutional clause. The Sixth Circuit affirmed the District Court's Decision, agreeing that the wording of the constitution was clear and was appropriately applied by Local 912. (A. 24-5, Sixth Circuit Decision of 7/27/95). The Decision of the Sixth Circuit does not conflict with any other Court's Decision nor does it depart from accepted and usual judicial proceedings. Therefore, the Petition should be denied.

II. OTHER ISSUES RAISED.

Without specifying a grounds for the granting of their Petition, Petitioners allege that the Sixth Circuit Decision usurped the province of the jury as to several claims, including state law claims. Though this allegation wholly fails to satisfy any of the categories stated for the acceptance of a Petition for Certiorari, Local 912 will briefly respond to show that the Sixth Circuit cited the proper Standard of Review, and followed the same. The Sixth Circuit reviewed the Grant of Summary Judgment *De Novo*, accorded to the Plaintiffs/Petitioners the most favorable reading of the evidence and determined that judgment as a matter of law was appropriate. (A. 9-10, Sixth Circuit Decision of 7/27/95)

Petitioners raise this argument regarding the state law claim of conspiracy, one of the claims dismissed prior to trial by the District Court. The Sixth Circuit properly determined that Plaintiffs had failed to establish by any evidence the necessary elements of conspiracy. The central failure of Plaintiff's conspiracy claim was its inability to establish the requisite underlying tort, here alleged to be tortious interference with contract. The Sixth Circuit held, in accordance with ample Tennessee precedent, that Local 912 could not have tortiously interfered with a contract to which it was a party. *Kochler v. Cummings*, 380 F.Supp. 1294, 1313 (M.D. Tenn. 1971). There is no dispute within the Courts of Tennessee regarding this

issue nor does the decision of the Sixth Circuit conflict with the Tennessee Decisions. Therefore, the Petition for Certiorari on this matter should also be denied.

CONCLUSION

Petitioners have failed to meet any of the necessary requirements for acceptance of a Petition for Certiorari. On the issues raised, breach of the Duty of Fair Representation, constitutional claim and state law claims, Petitioners have failed to show that there is any conflict among the Circuits or between this Circuit and the Tennessee Supreme Court. The Sixth Circuit has not departed from the accepted and usual course of judicial proceedings and there is no special or important reason for the Supreme Court to grant Certiorari in this case. Respondent Local 912 respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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